FILE COPY

Office Supreme Court
FEB 6 19

No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

VS.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

MOTION FOR SUBSTITUTION

AND

SUPPLEMENTAL BRIEF FOR PETITIONERS

—By—

SIDNEY F. ANDREWS,
W. L. COOK,
Attorneys for Petitioner,
James C. Davis, Federal Agent.

McCURDY-YOUNG CO., HOUSTON

No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

vs.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

MOTION FOR SUBSTITUTION

Andrew W. Mellon, Federal Agent, by his attorneys of record, moves the Supreme Court of the United States to enter an order substituting him for James C. Davis, Federal Agent, in order that the cause proceed for disposition in this court on its merits. Petitioner waives none of the matters presented in his brief.

.....

.....

Attorneys of Record for the Federal Agent.

The undersigned counsel for respondent acknowledge receipt of a copy of the foregoing motion, and waive service thereof.

.....

.....

Counsel for Respondent.

No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

vs.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

SUPPLEMENTAL BRIEF FOR PETITIONERS

In course of the oral argument on January 23rd a question was raised by Mr. Justice Van Devanter concerning the probable application and effect of Section 11, subdivision (a), of Chapter 229, of the United States Statutes at Large, Volume 43, which was approved on February 13, 1925, and, by its terms, became effective three months thereafter. This is also found in United States Code Annotated, Title 28, Section 780, under the heading "Judicial Code and Judiciary." The language to which Mr. Justice Van Devanter had reference reads as follows:

> "Sec. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his

> official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

The question raised was whether or not, in view of the quoted language, the court was authorized to further consider the case on its merits, the doubtful point being as to jurisdiction. Andrew W. Mellon became Federal Agent under appointment of the President of the United States on January 1, 1926, succeeding James C. Davis in that position. If the statute were applicable and controlling, it is obvious that much longer than the six months allotted in its provisions would have elapsed and substitution in conformity therewith could not now be accomplished.

The court, however, has heard the argument in the case on its merits and has permitted the filing of a motion for substitution and of this supplemental brief touching the question above mentioned. In respect to the application and effect of the statute mentioned, and further in respect to the failure to have previously substituted Andrew W. Mellon for James C. Davis as Federal Agent, Petitioner respectfully presents the following suggestions:

The substitution Statute of 1925 above quoted is designated "An Act to Amend the Judicial Code, and to

further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes." The concluding paragraph of the statute, which is Section 14 thereof, reads as follows:

> "That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

Before calling attention to the history of this case chronologically, we wish to suggest that the quoted provisions seemingly were intended to regulate procedure in the Federal courts. This consideration may be of some importance in the further analysis of the problem. It should be noted, however, that the judgment of the Supreme Court of Texas was rendered on March 27, 1929. (R. 130-31.) Due to a typographical error in our brief, which was overlooked in the reading of the proof, we said that the judgment of the Supreme Court of Texas was entered March 27, 1928. The date, however, for the overruling of the motion for rehearing is correctly shown on page two of the brief. Since James C. Davis retired as Federal Agent and was succeeded by Andrew W. Mellon on January 1, 1926, it is obvious that there exists no right of substitution under either the Statute of 1925 above quoted, or under the Statute of 1899, which is quoted in our brief in the appendix. The 1925 statute permits substitution within six months after the retirement of the predecessor official and the 1899 statute authorized substitution within one year after such retirement. More than four years have elapsed since Andrew W. Mellon became Federal Agent. Sub-

stitution may be accomplished, if at all, under Section 206, paragraph (h) and (i) of Transportation Act, 1920, (42 St. L., 1443). See Petitioner's brief, pp. 28-29.

We respectfully submit, however, that the 1925 statute above quoted has no application because of the language of Section 14 thereof, which we have also quoted above. In considering the application and effect of this Section 14, it should be borne in mind that the Supreme Court of Texas had this cause before it from November 5, 1924, the date the writ of error was granted therein, until April 24, 1929, the date the motion for rehearing was overruled by it after judgment was rendered. (R. 130, 136.) Judgment, of course, had already been rendered by the District Court and by the Court of Civil Appeals, as shown by the record, and upon this consideration we invoke that portion of Section 14 which provides that the statute shall not affect "the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

With reference to the probable effect of the Statute of 1899, we have already presented our contentions. It is not assumed that this statute could possibly have the effect of depriving Petitioner of the right to be heard in this court on the issues tendered, except upon the possible hypothesis that the respondent procured no valid judgment in the trial court, due to a total lack of jurisdiction in that court under the effect of said Statute of 1899. If this is the opinion of the court and it is not inconsistent for the court to so indicate in its opinion, it might be of substantial assistance to the Federal Agent and his counsel in guiding their further

course in the handling of this and possibly other similar problems.

In respect to this Statute of 1899, the attention of the court is further called to the fact that the substitution of James C. Davis as Federal Agent was opposed in the trial court because it was too late. This consideration presented one of the important grounds on the appeal. The Texas courts have held in respect to this matter that further substitution than that accomplished was unnecessary and that the substitution which was accomplished was consistent with existing law. See the opinion of the Supreme Court on this subject (R. 134); also see the opinion of the Court of Civil Appeals on this subject. (R. 87-9.)

The provisions of what has been termed the Winslow Act were held applicable by the Texas courts. This Act is copied in the appendix to our brief on pages 28 and 29 thereof. Upon examination of this last mentioned statute, the court will note that it is specific legislation dealing with actions, suits, proceedings and reparation claims arising out of the Federal administration of railroads, being such as are described in previous subdivisions of the Transportation Act. The pertinent provisions of the Transportation Act, insofar as this particular cause is concerned, are subdivisions (a) and (d) of Section 206. See United States Code, Title 49, Section 74; also 41 Stat. L., 461.

Subdivision (a) provides for the prosecution of actions against the Federal Agent where, prior to Federal control, such actions could have been prosecuted against the Director General, and further provides a period of limitation of two years after the effective date of the

statute within which such actions may be filed.

Subdivision (d) reads as follows:

> "Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

If, therefore, the Winslow Act, being subdivisions (h) and (i) of Section 206 of the Transportation Act (42 Stat. L. 1443), can have application, it is because of the inclusion of this cause under either subdivision (a) or (d) of said Section 206, and because of the satisfaction of the provisions of the Act in respect to the time and manner of bringing the action originally. If it be assumed that the action was properly commenced within the period of limitation prescribed, as required by the provisions of the Act, and that said action was pending at the time the subdivision took effect, then, of course, subdivision (h), known as the Winslow Act, would have application and relieve the case of all embarrassment in respect to substitution. The statute plainly says that, those conditions being met, the action "shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award, the agent designated by the President then in office."

It is also provided in subdivision (i) that orders providing for substitution already made shall be validated, and that actions, suits, etc., of the character previously described, which have been abated or dismissed solely because of the provisions of the Act of February 8, 1899, shall be reinstated if motion therefor be filed within one year from the time the subdivision takes effect.

If this action were before the court with the positions of the parties reversed, that is, with Mrs. Preston as the petitioner, and the Federal Agent as the respondent, it would seem reasonable to say that a compliance with the conditions of subdivision (h) of Section 206, aforesaid, would permit the continued prosecution of the cause without the necessity of further substitution, except upon condition that substitution be accomplished prior to satisfaction of the judgment. It is difficult, if not impossible, to suppose that this statute could thus be invoked in behalf of the party holding the judgment against the Federal Agent in this cause, precluding the abatement of the action, and with the attitude of the parties reversed, not having the effect of allowing the Federal Agent, as petitioner, to proceed without the necessity of accomplishing some form of substitution.

Attention is again called to the fact that substitution was not possible within the periods prescribed by either of the Statutes of 1899 or of 1925, and that no other statute is applicable requiring such substitution.

Accordingly, it is respectullly submitted as our conclusion on this matter that the Statute of 1925 is not applicable, for two reasons, (a), because Section 14 thereof precludes its application, and (b) because under no hypothesis could there have been a compliance with the statute in face of the rulings of the courts of

Texas, holding that the substitution Statute of 1899 had no controlling effect, in view of the Winslow Act.

The Statute of 1899 was repealed by the Statute of 1925. See Section 13, Chapter 229, 43 Stat. L., 942.

A further consideration that should be mentioned is that the surety on the bond is a party to this cause. The petition for certiorari so indicates, although the signature was not in strict accord with the rules in this matter. The bond on petition for certiorari was omitted in the printing, but appears in the original record at page 192, and is a supersedeas bond and not merely a cost bond. It was the bond required by the Supreme Court of Texas in connection with the proceeding for certiorari. Perhaps the rights of the surety on the bond should be given consideration in connection with this problem. It might be the contention of the Respondent that the surety on the bond would have to pay the judgment, even though, under technical statutory rules, the Federal Agent could not be required to pay without some further litigation.

On the whole question, it is respectfully submitted that the cause should proceed to decision on the merits and in light of the considerations presented in our brief.

Respectfully submitted,

Sidney F. Andrews,

W. L. Cook,
Attorneys for Petitioner,
James C. Davis, Federal Agent.

The undersigned counsel for respondent acknowledge receipt of a copy of the foregoing supplemental brief, and waive service thereof.

.....

.....

Counsel for Respondent.